ABDUL RAHIM ABDUL HAMID & ORS

v.

PERDANA MERCHANT BANKERS BHD & ORS

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
ABDUL KADIR SULAIMAN JCA
HASHIM YUSOFF JCA
[CIVIL APPEAL NO: W-02-106-2001]
16 AUGUST 2004

CIVIL PROCEDURE: *Appeal - Fact, findings of - Interference by appellate court - When may appellate court disturb factual findings of trial court - Whether findings based on credibility of witnesses - Whether findings supported by the evidence - Whether trial judge committed error of law - Whether oral testimony of witnesses tested against contemporaneous documents - Recovery of loan - Whether bank breached loan agreement or duty of care*

EVIDENCE: *Appeal - Interfering with findings of fact - When may appellate court disturb factual findings of trial court - Whether findings based on credibility of witnesses - Whether findings supported by the evidence - Whether trial judge committed error of law - Whether oral testimony of witnesses tested against contemporaneous documents - Recovery of loan - Whether bank breached loan agreement or duty of care*

This was an appeal from the orders of the High Court made pursuant to the disposal of a consolidated action of two suits, one filed in Kuala Lumpur ('the KL Suit') and the other in Johor Bahru ('the JB Suit'). In the KL Suit, the six plaintiff banks therein (the 1st to 6th respondents in the instant appeal) had sought to recover a RM20 million loan from the four defendant guarantors therein (the 1st to 4th appellants in the instant appeal). In the JB Suit, the sole claimant/borrower/company therein (the 5th appellant in the instant appeal) had sued the 1st defendant therein (the 1st plaintiff bank in the KL Suit which was also the 1st respondent in the instant appeal) for a breach of the loan agreement and for negligence as the trustee and agent of the plaintiff banks, and the 2nd defendant therein (the 7th respondent in the instant appeal) as the receiver and manager appointed by the plaintiff banks for the said borrower/company. After a full hearing, the learned judge dismissed the JB Suit and allowed the KL Suit.

Held (dismissing the instant appeal)
Per Gopal Sri Ram JCA delivering the judgment of the court:

[1] The learned judge had reviewed and considered both the documentary evidence and the oral testimony of the parties with care. Having tested the versions given by each party against the contemporaneous documents, he found the case of the borrower/company to be wanting in credibility. He also found no breach of any duty of care or any breach of agreement on the part of the lender/bank which had acted as the trustee and agent for the other lenders/banks. The question whether there has been a breach of a duty of care or a breach of an agreement is, unquestionably, one of fact, and the factual findings of the learned judge, based as they were purely on the credibility of the witnesses called, should not, therefore, be disturbed. (p 616 d-e)

[2] The Court of Appeal will not, as a general rule, interfere with the questions of fact decided by a trial court based on the credibility of the witnesses as seen and heard by that court. In the instant appeal, there was no error in the judgement of the learned judge which could take it outside this general rule and open it up to review. In fact, the specific findings of the learned judge were well supported by the evidence. (p 616 f-h)

[Orders of High Court affirmed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini merupakan rayuan dari dari perintah-perintah Mahkamah Tinggi yang dibuat berhubung dengan dua tindakan, satu difailkan di Kuala Lumpur ('guaman KL') dan satu lagi di Johor Bahru ('guaman JB'). Di dalam guaman KL, enam plaintif bank iaitu responden pertama sehingga enam dalam rayuan semasa, memohon untuk mendapat kembali RM20 juta pinjaman dari empat defendan penjamin iaitu perayu pertama sehingga empat di dalam rayuan semasa. Di dalam guaman JB, yang menuntut/ peminjam/syarikat iaitu perayu kelima di dalam rayuan semasa telah menyaman defendan pertama (plaintif pertama didalam guaman KL yang juga merupakan responden pertama di dalam rayuan semasa)untuk satu kemungkiran kontrak pinjaman dan untuk kecuaian sebagai pemegang amanah kepada bank-bank plaintif, dan defendan kedua disitu (responden ketujuh didalam rayuan semasa) sebagai penerima dan pengurus yang dilantik oleh bank-bank plaintif untuk peminjam/syarikat tersebut. Selepas perbicaraan penuh, yang arif hakim menolak guaman JB dan membenarkan guaman KL.

Diputuskan (menolak rayuan semasa)
Oleh Gopal Sri Ram HMR memberi penghakiman mahkamah:

[1] Yang arif hakim telah mengkaji dan menimbang kedua-dua keterangan dokumentar dan testimoni saksi-saksi dengan hati-hati. Setelah menguji versi-versi yang diberikan oleh saksi-saksi dengan dokumen yang sedia ada, beliau mendapati kes peminjam/syarikat kekurangan kebolehpercayaan. Beliau juga mendapati tiada kemungkiran kewajipan berjaga-jaga atau kemungkiran kontrak pada pihak pemberi pinjaman/ bank yang telah bertindak sebagai pemegang amanah dan ejen kepada pemberi-pemberi pinjaman/bank-bank yang lain. Persoalan samada terdapat kemungkiran kewajipan berjaga-jaga atau kemungkiran sesuatu perjanjian adalah satu persoalan fakta, dan pendapat fakta yang arif hakim, yang didasarkan secara mutlak pada kebolehpercayaan saksi-saksi yang dipanggil, dengan itu, tidak wajar diganggu.

[2] Mahkamah Rayuan tidak akan, pada amnya, menganggu keputusan persoalan fakta yang telah diputuskan oleh mahkamah bicara berdasarkan kebolehpercayaan saksi-saksi yang telah dilihat dan didengar oleh mahkamah tersebut. Dalam rayuan semasa, tidak terdapat sebarang silap didalam penghakiman yang arif hakim yang melanggar rukun am ini dan menwajibkan penghakimannya dikaji semula. Malahan, keputusan yang arif hakim jelas disokong oleh keterangan.

Perintah-perintah mahkamah tinggi disahkan.]

For the appellants - Wong Kim Fatt (Wong Boon Lee); M/s Gulam & Wong
For the 1st-6th respondents - Vinayaga Raj (Wong Chee Lin); M/s Skrine
For the 7th respondent - V Vijayakumar; M/s Albar & Partners

[Appeal from High Court, Kuala Lumpur; Suit No: D1(D9) 22-501-1994]

Reported by Gan Peng Chiang

JUDGMENT

This is the judgment of the court.

The appeal herein is directed against the orders made by the High Court in a consolidated action of two suits. In one of these suits, *viz*, D1-22-501-1994 ("the KL action"), the plaintiffs are the lenders of a sum of RM20 million to the fifth appellant in this appeal. They sought to recover their loan from the fifth appellant as borrower and from the first to the fourth appellants as guarantors of the loan. In the other suit, 22-98-1994 ("the Johor Baru action"), the plaintiff is the fifth appellant and the defendants are the first respondent as trustee and agent of the other lenders

as well as the receiver and manager appointed by the lenders over the business and affairs of the fifth appellant. The gist of the Johor Baru action is that the first defendant in that action acted negligently and in breach of the terms and conditions of the loan agreement. This much is obvious from para. 10 of the statement of claim and the declaratory relief sought at the foot of that pleading.

The consolidated actions came on for hearing before the High Court at Kuala Lumpur. The learned judge who heard the matter dismissed the Johor Baru action and entered judgment for the lenders in the KL action. In the present appeal the appellants' complaints are directed against the dismissal of the Johor Baru action. This is hardly surprising. If the learned judge was wrong in dismissing that action it would follow that the lenders cannot succeed in their KL action.

The learned judge in his judgment has carefully reviewed the evidence, in particular the oral testimony led by each side. He has also given careful consideration to the relevant documentary evidence. Most importantly, he has tested the story of each side against the contemporaneous documentary evidence and found the borrower's case to be wanting in credibility. He has also negatived any breach of duty or breach of contract on the part of the lenders, in particular the first defendant in the Johor Baru action (the trustee and agent of the lenders). Now, it is settled that the question whether there is a breach of a duty of care is one of fact. So is it also well settled that the question whether the terms of a contract were broken is an issue of fact depending on the facts and circumstances of each case. The findings made by the learned judge are therefore of pure fact based on the credibility of the witnesses called by the parties before him.

We have said often enough that this court will not as a general rule, interfere with questions of fact decided by a trial court based on the credibility of witnesses seen and heard by that court. We are unable to detect any error on the part of the learned trial judge which takes this case out of the general rule. Quite the contrary. We have carefully scrutinised the evidence and find that it entirely supports the specific findings of fact made by the learned judge. We would also add, in fairness to the receivers and managers that not a shred of evidence of negligence was adduced against them. The learned judge was accordingly quite correct in dismissing the action against them.

In these circumstances we are of the view that this appeal is devoid of merit. It is dismissed with costs. All orders made by the High Court are affirmed.